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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 58

IN RE
GEORGE ANASTAPLO,
Petitioner.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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INTEREST OF AMICUS.

The American Civil Liberties Union appears as *amicus curiae* in this case with the consent of both parties filed with the Clerk of the Court. This informal memorandum is submitted to be of what help we can to the Court. Counsel for amicus also are friends of the Petitioner, whom we knew first as a law student at the University of Chicago, and we have followed with some concern the long course of his efforts since 1951 to become a member of the bar of Illinois. We know that the Petitioner has been quite independent in his views; that he has insisted upon his position—stubbornly if you will—as a matter of principle, when he could easily have taken a more

conformable course; that he has taken many hours of bar committee time, and that many tempers have been ruffled. But, we also know that the Petitioner has acted in good faith, with dignity and at considerable personal sacrifice to himself and his family in an honest belief that he is right. We realize, of course, that our personal assessment of the Petitioner can scarcely weigh in the determination of the issue now before this Court but we would be less than candid if we did not acknowledge at the outset the affection, concern, and respect we feel for him.

We realize that the issues raised by the Petitioner's stubbornness as they come before this Court are rich in perplexities. But as teachers of law engaged in training young men for a life at the bar, we are impressed, too, with the large significance of these issues. They involve nothing less than a definition of the desired moral character of the American bar; and as such they touch matters of national public interest. For an independent, intellectually honest and morally courageous bar is as integral to the sound functioning of American democracy as is an independent judiciary.

THE QUESTION PRESENTED.

The question presented for review in this case is whether a state in the regulation of admission to its own bar can, consistently with the mandate of the Fourteenth Amendment, deny admission to an applicant who in good faith and as a matter of principle or conscientious objection refuses to answer whether he is a member of the Communist Party, assuming that the record apart from this refusal contains adequate and satisfactory evidence that he has the requisite moral character.

MATTERS NOT IN DISPUTE.

We begin with a series of points as to which there is, we think, no substantial disagreement. Discussion of these, however, will conveniently serve as a preface to the argument which follows:

First, the propriety of the question about Communist affiliations need not, in our view, be in issue. That is, the Petitioner's case does not stand or fall on the argument that the question is improper and beyond the power of the bar committee to ask. For the sake of argument, it can be conceded that the question is proper and relevant, and that the asking of it does not violate any constitutional privilege of the Petitioner.

We would note, however, that the Petitioner's objections to the question were not frivolous at the time he first made them in 1951, preceding as they did the decision in *Dennis* v. *United States* (1951), 341 U. S. 494, and have not become frivolous since. This Court has never passed on the exact issue presented. The case most closely in point, *American Communications Ass'n* v. *Douds* (1950), 339 U. S. 382, might well be distinguished, upon full consideration, because of the differences between labor union leaders and members of the bar. Further, in *Konigsberg* v. *State Bar of California* (1957), 353 U. S. 252, this Court explicitly said that the issue was not frivolous. And the only noteworthy development since *Konigsberg* is the decision in *Yates* v. *United States* (1957), 354 U. S. 298, which served to narrow appreciably the degree to which being a member of the Communist Party might constitute a crime. Finally, we would emphasize that Petitioner's objections have special merit on this record, since the Bar Committee laid no adequate foundation for asking him questions about membership in the Communist Party.

Second, there can be no doubt of the inadequacy of the

warning to Petitioner, that is, if Illinois now seeks to justify its action upon the ground only that Petitioner refused to answer a relevant question.

The Committee at no time gave the sort of warning contemplated by Mr. Justice Black, in *Konigsberg*, 353 U. S. at p. 260-1, or, as was actually given in *Lerner* v. *Casey*, 357 U. S. 468 and in *Beilan* v. *Board of Education*, 357 U. S. 399. That is, he was never told that failure to answer the question: Are you a Communist? Would of itself be ground for denying his petition.

Both Committee and Court state the contrary, for they say: "unlike the situation in *Konigsberg*, no problem exists as to inadequate notice of the consequences of a refusal to answer." (Petition, p. 24 and p. 48.) The Committee points to two places in the record to support its statement, but it will be enough to refer to one only, as the other is equally inadequate. At pages 116-117 of the Committee Record (one of the two references), Commissioner Stephan tells Petitioner that the question is an important one—"to be treated very seriously" —and then follows this colloquy:

> Mr. Anastaplo: Yes, I would like to find out exactly what this entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?
>
> Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might.
>
> Mr. Anastaplo: I see.

It is surely clear that a "could and might" warning is a very different thing from a peremptory warning that unless Petitioner answer he will be barred. The Committee's warning went only so far as to tell Petitioner that a failure to answer the Communist question would be weighed heavily in determining "moral character and good

citizenship;" it was an assurance that the Committee would not make failure to answer an automatic bar, as considered in *Konigsberg*.

Third, we assume that nothing turns on whether we classify admission to the bar as a matter of *privilege* or as a matter of *right*. This old dichotomy is not an aid to analysis. It is clear that, however we classify it, admission to the bar involves substantial interests of the applicant, who has invested much time and money in the pursuit of legal training. In *Schware* v. *Board of Examiners* (1957), 353 U. S. 232, moreover, this Court has set the matter at rest. Even if admission to the bar is seen as a privilege, it is a privilege which can be denied by a state only if there is compliance with the mandate of the Fourteenth Amendment.

Fourth, we assume that this case presents no question of special sensitivity in the area of state-federal relationships. One might well argue on the contrary that there is a strong national interest in the moral quality of state bars making up as they do the national bar. But we take it to be clear, in any event, that the state has no *special* local interest in this matter, greater, for example, than it had in determining the qualifications for school teachers in *Wieman* v. *Updegraff* (1952), 344 U. S. 183. Indeed, one of the most recent decisions of this Court (*Schware* v. *Board of Examiners* (1957), 353 U. S. 232), found invalid, under the Federal Constitution, efforts of the state to regulate admission to its bar. See also, *Ex Parte Garland* (1866), 4 Wall. 333.

Fifth: There is no dispute that petitioner must carry the burden of proof, that is, the burden of furnishing the Committee with "such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the Bar." Ill. Rev. Stat. 1959, c. 110, §101.58. Sect. IX.

While this language requires that the Committee must be satisfied of Petitioner's qualifications, we take it to be clear that the Committee may not for some captious reason refuse to certify an applicant, and thus block his admittance to the Bar. In the first place, the Committee is but an agency of the Supreme Court, and it is the Court which has the plenary power to grant or deny admission. The findings of the Committee are entitled to respect, much as are the findings of a master, but they are not binding upon the Supreme Court.

Further, we assume that the Illinois Supreme Court must itself be guided by some objective standard in determining what constitutes "moral character and good citizenship." We recognize that this language is ambiguous, but it would be quite intolerable to suppose that, therefore, it gives either court or committee free rein to give it a biased or irrational meaning. *Schware* v. *Board of Bar Examiners* (1957), 353 U. S. 232. Indeed, it would be meaningless to speak of "burden of proof," as Mr. Justice Harlan does in *Konigsberg* (1957), 353 U. S. 252, 277, if there were no discernible standard to be met.

It is thus evident that Petitioner is not faced with Mr. Justice Harlan's contention in *Konigsberg* (1957), 353 U. S. 252, 311, that a State through its Admissions' Committee may properly require an applicant to answer any relevant question (not constitutionally privileged) as a condition of admission. Nor is it necessary to point out that insistence upon a bureaucratic nicety of that sort, in complete disregard of substantial evidence of moral character and good citizenship, might be an unwise way for a State to order its affairs. It is enough to say that Illinois has not done so.

We do not enter upon a discussion of whether, in Illinois, it is a function of the Court or of the Legislature to state the qualifications for admission to the Bar. Grant that

it is a power inherent in the Court, *In re Day* (1899), 181 Ill. 73, 89, nevertheless, nothing turns on the point here, for the Court has long accepted the legislative test of "moral character and good citizenship." But it is important to insist, as Chief Justice Cartwright stated in that case, that admission to the bar is an "exercise of judicial power"; admission or exclusion "is not the exercise of a mere ministerial power." Ibid. p. 90.

Sixth: It is also clear, we submit, that Petitioner has met the burden of proof; that is, there can be no rational doubt that—save for his refusal to answer questions concerning his religious and political affiliations, a matter to be discussed later—Petitioner has fully established his "moral character and good citizenship," however strict the standard may be. Not only has he furnished far more affirmative evidence than is usual, but he has freely answered the Committee's questions for hours on end concerning his background, his views on political and social questions, on all manner of things. And, it is significant, that neither Court nor Committee has pointed to any evidence raising any doubt as to petitioner's moral qualifications or his good citizenship.

The Committee, in fact, expressly put the point beyond question when it said:

> Since applicant's original application was denied, he has been engaged principally in the academic life as an instructor and research assistant at the University of Chicago. From the character affidavits and reference letters which have been submitted to us, it would appear that the applicant is well regarded by his associates, by professors who taught him in school and by members of the Bar who know him personally. We have not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation. We have received no information from any outside source which would cast

any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group. (Petition, Appendix pp. 11-12.)

Seventh: We take it, finally, to be clear that Petitioner has maintained his position throughout this proceeding in sincere and dignified adherence to principle. The record discloses him to be a man well read in philosophy, in government and in the history of social ideas, who holds the refreshing view that the ringing declarations of Jefferson, Lincoln, and our other great leaders are to be taken seriously—particularly by members of the bar. The minority members of both Court and Committee have stated their belief in Petitioner's sincerity.

Indeed, the majority report of the Committee would indicate that, so far from having any doubts of Petitioner's sincerity, it was disturbed rather by the firmness of his convictions. The report states:

> A majority of the Committee has arrived at the conclusion that the views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines. (Petition, Appendix p. 14.)

Thus it is not Petitioner's good faith which is in question but whether his sincere belief that the rights afforded by the First and Fourteenth Amendments are broader than this Court has yet declared them to be, is to be brushed aside and wholly ignored when passing on his moral character and good citizenship. Were the Constitution a thing of fixed and unchanging content something could be said for this view, but it is not. Moreover, it is the business

of the lawyer, as of the dissenting judge, as a matter of intellectual integrity, to insist on his views in all proper ways, even though contrary to the existing order. Petitioner's views may be wrong; he may have chosen the wrong forum in which to assert them; but, surely, he is not to be said, because of a good faith error of judgment, to have failed to make out a case of good moral character.

In his dissent in *Konigsberg*, 353 U. S. 252, at 312, Mr. Justice Harlan writes that "a State may refuse admission to its Bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area." We have pointed out above that Illinois has not made refusal to answer, but a lack of "moral character and good citizenship," the test. Even if this were not true, we respectfully suggest that it will not do to lump all questions together, just so long as they are relevant. It is one thing to require an applicant to answer as to his age, his past addresses, his employers, and quite another to insist that he say whether he is a Republican, a Democrat, or a Communist. The question here is whether a petitioner, who in good faith believes that the latter questions "invade a constitutionally privileged area," and refuses to answer them on that ground, may be denied admission, if he in all other respects is eminently well qualified.

THE MAIN ARGUMENT.

The majority of the Illinois Committee on Character and Fitness, in denying the Petitioner's application appears to have done so on confused grounds. It stated that his refusal to answer questions about Communist affiliations: "(i) obstructs the lawful processes of the Committee, (ii) prevents inquiry into subjects which bear intimately on the issue of character and fitness, such as loyalty to

our basic institutions, belief in representative government and *bona fides* of the attorney's oath and (iii) results in his failure to meet the burden of establishing that he possesses the good moral character and fitness to practice law, which are conditions to the granting of a license to practice law." (Petition, Appendix p. 26.) And again the Committee states: "By reason of applicant's own recalcitrance he has failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the Bar. We cannot certify the applicant as worthy of the trust and confidence of the public when we do not know that he is so worthy and when he has prevented us from finding out." (Petition, Appendix p. 27.)

The final action in this case, of course, was taken by the Illinois Supreme Court. The appeal herein is taken from that court's decision, not from the action of the Committee. But the Illinois court wrote only a *per curiam* opinion and, on careful reading, we find no point at which it disapproves or departs from the majority report of the Committee on Character and Fitness. Indeed, the final sentence of the court's opinion states: "The report of the Committee on Character and Fitness is confirmed." (Petition, Appendix p. 53.) Such being the case, and since the majority report of the Committee is more explicit than the *per curiam* opinion of the Illinois Supreme Court as to the exact grounds on which the Petitioner was denied admission, we deem it appropriate to refer back to the majority report of the Committee for an authoritative statement of the grounds on which the Illinois court acted.

A. Evidentiary Grounds for Denial.

In our view, the Committee statements may fairly be read to indicate that, in the face of Petitioner's refusal to answer, it was left with a naked doubt as to Petitioner's character, and hence refused to certify him on that ground.

But, to express a doubt in such circumstances is but another way of saying that Petitioner's refusal gives rise to an inference of bad character. For surely, as pointed out above, the question is not whether the Committee or the Illinois Court had *some* doubt—which is probably true in every case—but whether that doubt, or the inference upon which it rests, is such that, notwithstanding the affirmative evidence in the case, the Committee is required to say that Petitioner has failed to sustain the burden of proof upon the question of "moral character and good citizenship."

It is necessary, at the outset, therefore, to examine what inferences may be drawn from Petitioner's refusal to answer. Presumably the Communist questions are *relevant* because activity in the Party may bear on the moral fitness of an applicant. But the Committee may also have thought that the simple fact of refusal to answer a relevant question, of whatever import, was—in and of itself—direct evidence of bad character or bad citizenship. It is our position that, whether the Committee took either or both views, Petitioner's refusals to answer in the circumstances of this case, do not on any rational view outweigh the affirmative evidence of "moral character and good citizenship" which Petitioner has presented.

It will be helpful to note at this time that the Committee and the Illinois Supreme Court may have based their action on either of two other grounds. First, the Court may have based its action on the supposed incapacity of the Petitioner to take the prescribed oath; or, second, by relying heavily on Mr. Justice Harlan's statement in *Konigsberg*, 353 U. S. 252, 311, that a State may properly deny admittance to any person who refuses to answer any relevant (and not constitutionally protected) question, the Court may have made the bare fact of Petitioner's refusal, irrespective of any character question, the ground upon which he was denied admittance. Since we are presently

concerned with questions of "moral character and good citizenship", these points will be taken up later.

We come then to what, if any, inference of bad character may be drawn from Petitioner's refusal to answer. Here the Committee appears to argue itself out of court, for it says: "We draw no inference of disloyalty or subversion from applicant's refusal to answer questions concerning Communist or other subversive organizations." (Petition, Appendix p. 26.) This surely would dispose of the point were it not for another statement by the Committee majority made earlier in its report. There, after stating quite accurately that, in the circumstances of a case such as this, *Konigsberg* had held that a Committee might not draw inferences of bad moral character, the Committee went on to say that *Konigsberg* nevertheless, "did *not* hold that such a condition of a record affirmatively entitled an applicant to certification." (Petition, Appendix p. 19.)

Thus, having put itself out of court by one door the Committee came right back in by another. It would not draw inferences of bad character; it would simply ask Petitioner the same questions over again and, if he persisted in his refusal to answer, the Committee would "not be acting inconsistently with *Konigsberg* in denying certification." (Petition, Appendix p. 19.) It is hard to imagine a more transparent disregard of the plain import of this court's holding in *Konigsberg*. The Committee's questions had no greater propriety, and Petitioner's objections were no less valid, after *Konigsberg* than before. Despite its denial, therefore, it would seem clear that the Committee may well have placed reliance on Petitioner's refusals as showing a lack of "moral character and good citizenship." Not, to be sure, in order to find that he lacked character, but to justify its refusal to certify him for admission—which comes to the same thing.

Likewise, it seems clear enough that the Committee

placed reliance on Petitioner's refusal to answer, as in itself showing a lack of "moral character and good citizenship." Indeed, the Committee says as much: "By reason of applicant's own recalcitrance he has failed to demonstrate the good moral character and general fitness to practice law necessary for admission to the Bar." (Petition, Appendix p. 27.) The Illinois court, at the conclusion of its *per curiam* opinion, repeats the Committee's statement almost word for word. (Petition, Appendix p. 53.) Thus, again, the Illinois Court and its Committee on Character and Fitness would circumvent the holding in *Konigsberg*. If it is improper, on this record, to draw inferences of bad moral character from Petitioner's refusal to answer, then it is improper to call his refusal "recalcitrance," as if that were a brand new test of character.

It is not necessary to labor the point for surely it is plain beyond words that whichever ground the Illinois court takes, it is met with the same objection. Why did Petitioner refuse to answer the Committee's questions? The record is very clear that he did so because he sincerely regarded them as an invasion of his Constitutional rights under the First and Fourteenth Amendments, not the Fifth. He has had the moral courage, moreover, through a long and trying time to insist upon his position. Nor is there any suggestion in the record—and we know of none—to indicate that he feared to answer. The Committee itself resolved the point when it said: "We have received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group." (Petition, Appendix pp. 11-12.)

A refusal to answer the Committee's questions in these circumstances is not "recalcitrance," but adherence to principle. The questions were asked initially, and from time to time over the several years, without any proper

foundation being laid for them. Petitioner asks, since he believed these questions to be improper, what was he to do? The answer is that he was to persist in his refusal, as he has done with dignity and courtesy. So far from giving rise to a permissible inference of bad character, therefore, or of bad "recalcitrance," the contrary is true. For, as Mr. Justice Black said in *Konigsberg*, at p. 273:

> A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.

There is nothing puzzling about Petitioner's silence when asked about his religious and Communist affiliations, except to those who have forgotten the proud American traditions of personal independence. The question here is not whether Petitioner correctly measured his rights under the Constitution, for that is a matter of judgment; the question here is one of character.

Petitioner has supplied the Committee with affirmative evidence of his "moral character and good citizenship" which, except for his refusals to answer, fully satisfy his burden of proof. This is really not questioned. We submit further that Petitioner's refusal to answer Committee questions in the circumstances of this case, does not cast any rational doubt on the affirmative evidence of good character which Petitioner has furnished to the Committee. When 0 is taken from 100 it will not do to find that only 49 is left. It follows, that the Illinois court acted capriciously and with no rational basis for its actions in violation of the 14th Amendment when it denied Petitioner's application to be admitted to the Bar of Illinois. *Fiske* v. *Kansas* (1926), 274 U. S. 380.

B. The Oath as a Basis of Denial.

The Illinois Supreme Court, at the close of its *per curiam* opinion, cites *Barenblatt* v. *United States* (1959), 360 U. S. 109, to the point that "the relevance of an inquiry as to whether an applicant for admission to the bar is a member of the Communist Party is no longer debatable." Relevancy, of course, has never been the issue. It then goes on to hold "that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is *impossible* where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence." (Petition, Appendix, p. 53, emphasis added.)

The Court does not say that it draws any inference of bad character from Petitioner's refusals. Indeed, it carefully points out that the Committee "drew no inferences of disloyalty or subversion from Anastaplo's consistent refusals to answer questions concerning Communist or other subversive affiliations." (Petition, Appendix p. 52.) Whether this is true or not, is now beside the point; the Court bases its decision here on the bare proposition that it is "impossible" for an applicant, who refuses to answer such questions, to take the oath prescribed by the Illinois legislature for applicants to the Bar.

In explanation of its position the Court states that "a strong public interest supports the interrogation of applicants for admission to the bar on their adherence to our basic institutions and form of government and that this public interest overrides an applicant's purely personal interest in keeping such views to himself." (Petition, Appendix pp. 52-53.) This statement should be read with the Court's earlier declaration that: "In seeking the privilege of admission before this Court petitioner must be

deemed to have agreed to waive his constitutional right of free speech against relevant inquiry." *In re Anastaplo* (1954), 3 Ill. 2d 471, 483. The latter is more explicit and we believe better expresses the Court's basic viewpoint.

The Illinois Court, of course, is its own best authority for this pronouncement, for it can cite no other. But the result is that, in Illinois, when the Committee room doors close behind an applicant, he has left the United States outside, his rights under the First Amendment are gone. No wonder the Committee felt free to question Petitioner at length upon his religious affiliations, as upon his membership in this, that or the other political organization. But even the Committee finally had the grace to abandon its religious inquiries, which, of course, had some relevance upon Petitioners' ability to take an attorney's oath. It did so, however, only after Petitioner had painstakingly pointed out to it that the case upon which it relied, *Railroad Company* v. *Rockafellow* (1856), 17 Ill. 541, had been repudiated in Illinois nearly a century ago. (Petition, Appendix, p. 58.)

What precisely then is the "public interest" which the Illinois Court says will override First Amendment rights? It says it is the need to interrogate applicants "on their adherence to our basic institutions and form of government." But if any one thing is clear on this record, that is just what the Committee did do, as Justice Bristow ably points in his dissenting opinion (Petition, Appendix, pp. 53-78). Petitioner *has* answered, at great length, all of the Committee's questions as to his "adherence to our basic institutions and form of government." Nor does the Court in its *per curiam* opinion indicate the contrary, except as his bare refusal to answer concerning his religious and political affiliations, is such a showing.

Petitioner states, moreover, that he fully understands the nature of the attorney's oath, and he has assured the

Committee that he is entirely willing to give such an oath, without any qualification. Any doubts which the writers of the Court's *per curiam* opinion might have had as to whether it would be *possible* for him to do so, should have been set at rest by the fact that Petitioner served 38 months in active service with the Air Force, in the Pacific, European and North African theatres of war, just prior to entering law school in the Fall of 1947. (See Petition, Appendix, p. 62.) Petitioner had thus already taken an oath to defend our institutions, and demonstrated that he knew how to fulfill such an oath, but as to this, the Court majority simply keeps silent.

We submit, therefore, that there is no substance in the Illinois Court's declaration, that it is "impossible" for Petitioner to take the attorney's oath. Hence, Petitioner has been denied his rights to equal treatment under the laws, as guaranteed by the Fourteenth Amendment. The Communist question, of course, is relevant, but a refusal to answer, in the circumstances of this case, has very little weight. The Court is not at liberty to keep the First Amendment out of its Committee rooms, when it is fairly invoked by an applicant. Justices Schaefer and Davis, in their dissenting opinion make the point this way: "We do not see in this record any basis for a finding that the applicant's refusal to answer raises a doubt as to the sincerity with which he takes the oath to support the State and Federal constitutions." (Petition, Appendix p. 80.)

We suggest, moreover, this position is not at variance with *In Re Summers* (1945), 325 U. S. 561. But, if so, it is respectfully submitted that the majority in *Summers* proceeded on an erroneous premise,—that the Illinois Court perforce had whatever power the State might have. Mr. Justice Reed put it this way (p. 570-1): "The responsibility for choice as to the personnel of its bar rests with Illinois." Hence, since the Illinois Court had denied admission, the

State was taken to have done so. But the Illinois legislature did not give the Illinois court *carte blanche* to do as it saw fit; it merely prescribed an oath to be administered judicially according to rational and customary standards. And, it is submitted, by any rational test Summers fully established his ability to take the oath.

For the same reason, it is respectfully suggested that the Illinois Court abused its powers in this case, when it declared that it is "impossible" for an applicant to take the attorney's oath, *except* he answer this or that question of the Committee. Conditions of that sort are plainly for the legislature, not the court, to write. Given an inch by *Summers*, the court now would take a country mile.

Nor may the Court take extra power to itself by claiming that it would be *administratively convenient* to require applicants to answer Committee questions under penalty of being declared ineligible to take the oath. As to that Justices Schaefer and Davis dissenting, were quite explicit: "To refuse admission, therefore, would amount only to an assertion of power beyond that which is required in order to determine the question before the court." (Petition, Appendix, p. 80.)

In sum, if the Illinois Court's position is to be sustained, this Court must give its sanction to an extravagant assertion of court power, not only to usurp functions of the Illinois Legislature, but to sweep aside as well those rights of free speech which are guaranteed to citizens under the First Amendment. Either would be an appalling thing to do.

C. Automatic Grounds for Denial.

We now reach the point that Committee and Court may have treated the bare refusal to answer any relevant question, of whatever import, as in itself a sufficient basis for barring the Petitioner, quite apart from any question of

character. If this were the basis upon which the Court and Committee acted, it would make more intelligible their indifference to the affirmative evidence of good character in the record and to the abundant evidence that the Petitioner's objection was in good faith adherence to principle. For if the operative rule is that a refusal to answer a relevant question automatically bars the applicant, then other evidence in the record is indeed not relevant because no matter how strong it is, it cannot alter the fact that the applicant has refused to answer.

It is in order, therefore, to shift to an analysis of the merits, as a constitutional matter, of a rule which makes refusal to answer in itself the basis for a bar. It should be emphasized at the outset, however, that this puts the issue far more favorably than Illinois deserves. First, Illinois does not explicitly have such a rule, announced openly and publicly, and applied with an even hand to all applicants. Nor did the Committee clearly warn the Petitioner that it would apply such a rule in his case. Thus, if Illinois is to have such a rule, it will lie concealed in the guise of evidential determinations in particular cases and will be applied more or less as a matter of Committee whim. We lack, then, the weighty and deliberate judgment of the appropriate Illinois authorities that the refusal to answer relevant questions (not an invasion of Constitutional privilege) is in and of itself a sufficient basis for barring an applicant. But of one thing we may be sure, if the Illinois Court is sustained in its present action, such a rule will have become the operational law of Illinois, more or less by default.

We are brought, therefore, to the other wing of the *Konigsberg* case, and to the question which this Court expressly reserved. The Court there said: "If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the

cases arise, will have to determine whether the exclusion is constitutionally permissible." (353 U. S. 252, 261.) It is plain, of course, that if this case is reversed upon the ground that the Illinois Court applied an irrational test of "moral character and good citizenship," the question is not reached.

Before going on it should be pointed out that Mr. Justice Black is speaking of "failure to answer a question"; Mr. Justice Harlan, in his dissent, states that an applicant's refusal to answer any questions "which are reasonably relevant to his qualification and which do not invade a constitutionally privileged area" is in and of itself ground for rejecting the applicant. And, he says: "An applicant might state with the utmost sincerity that he believed that such information was none of the committee's business; yet it must be clear that his application could be rejected." *Konigsberg*, pp. 311-312. We take it that this fairly states the issue and that Illinois, whether explicitly or not, has sought to bring its action within Mr. Justice Harlan's language.

Since Mr. Justice Harlan makes nothing turn on the character of the applicant, it makes it unnecessary for him to consider the issues thus far discussed. Of course, a state could have a rule that any applicant's failure to answer any question which does not invade constitutionally privileged ground, as marked out by this Court's latest decisions, would of itself be a basis for denying admission. We say nothing as to whether a State might properly refuse admittance to an applicant who refused to reveal his past addresses or matters of that sort, since it is scarcely realistic to suppose that an applicant would take such a position. But we do submit that a bare refusal to answer in the sensitive civil rights area cannot be made a valid ground for denying admission.

The vice in Mr. Justice Harlan's position, we submit,

is that it would set up an irrational classification. The present case will afford illustration. Faced with the Communist question, as posed by the Committee without any adequate foundation being laid, many applicants would answer readily enough, perhaps because they did not even appreciate that a question of privilege might be involved. A second group, although inwardly irritated, might swallow their indignation and answer. But a few hardy citizens, including Petitioner, would refuse to answer in a good faith belief that the questions were improper. Their applications would be denied, even though the Committee had been furnished with satisfactory evidence of moral character and good citizenship. Thus the rule, in operation, would discriminate between applicants on grounds perversely unrelated to their character and intellectual integrity. It would prefer illiteracy or servility to candor and independence.

A State, of course, may set up standards for admission to its Bar. But it requires no citation of authority to say that its regulations must be rationally designed to accomplish the State's purposes. A rule of admission which, in addition to requiring legal training and good moral character, insisted as well on a knowledge of carpentry, or on a certain avoirdupois—matters having no conceivable relation to the practice of law—would surely be stricken down as an unfair and irrational classification. So, too, it is submitted, must a court-imposed rule requiring an applicant to answer as in this case, or be denied admission, since it operates in reverse to exclude an able man with intellectual integrity.

The closest legal analogy which might be applied to justify a Committee on Character and Fitness in denying admission for a refusal to answer its questions is that of contempt. Indeed, the Illinois Court appears to have relied heavily on *Barenblatt* v. *United States* (1959), 360 U. S. 109.

It is true that a witness before a Congressional committee, for example, if he refuses to answer about any possible Communist ties, must do so at his peril. If the question is held to be proper, the witness's refusal, regardless of good faith, may be punished as the crime of contempt of Congress.

But the function of the Bar Committee is not to punish applicants but to pass on their qualifications as future members of the Bar. As Justice Bristow put it in his dissenting opinion: "That body is not an Un-American Activities Committee charged with investigating Communists, with power to require—indirectly—non-communist oaths on pain of denial of admission to the bar. Nor is it conducting a contempt proceeding with a denial of the right to practice law imposed as punishment for refusal to answer questions which the Committee regards as 'proper'." (Petition, Appendix, p. 74.)

It will be recalled that Justice Traynor in the second *Konigsberg* case was moved to suggest that in order to avert "grave danger to freedom of speech" the burden on sensitive issues should be shifted to the examiners. Perhaps, the Illinois Committee was given its subpoena forms virtually unused, for just such a purpose. At all events, we share Justice Traynor's concern and we suggest that the ambit of constitutional protection should not be strictly confined—as at a razor's edge—to only those questions which are clearly within the constitution, but that a penumbra should be recognized where good faith, non-frivolous objection in principle can be made without severe penalty. Only such a rule will be congenial to the traditions of an independent bar.

D. Authorities Distinguished.

Various cases have been cited and relied upon, by the Illinois Committee on Character and Fitness and the Illinois Supreme Court, as a basis for denying the Petitioner in this case, which seem to us to be clearly distinguishable.

In re Summers (1945), 325 U. S. 561, might seem relevant since this Court affirmed the action of Illinois in denying admission to its bar to a conscientious objector to military service. However, *Summers* was premised, as we noted above, on the erroneous assumption that the state court had full discretion in setting the conditions for admission to the Illinois bar. Further, the majority in *Summers* relied heavily upon the naturalization cases, *United States* v. *Schwimmer* (1929), 279 U. S. 644, and *United States* v. *MacIntosh* (1931), 283 U. S. 605, which were explicitly overruled in *Girouard* v. *United States* (1945), 328 U. S. 61, 69. For these reasons we submit that *Summers* is no longer a controlling precedent.

Again, *Kimm* v. *Rosenberg* (1960), 363 U. S. 405, might seem relevant since there an alien in a deportation proceeding, who refused to answer about Communist affiliations, was deemed to have failed to meet his burden of proof that he was eligible for a stay of deportation. However in *Kimm* the refusal to answer was keyed to a claim of the privilege against self-incrimination under the Fifth Amendment and the suspension of a deportation order was expressly held to be a matter "of administrative grace." There is, therefore, on two grounds a wide distinction between *Kimm* and the present case, where there is no claim of the Fifth Amendment privilege and where admission to the bar can scarcely be classified as a matter of administrative grace.

The wide difference between refusal to answer keyed to a claim of privilege under the Fifth Amendment and the refusal to answer in the present case also affords, we

think, a sufficient basis for distinguishing such cases as *Orloff* v. *Willoughby* (1953), 345 U. S. 83, *Lerner* v. *Casey* (1958), 357 U. S. 486, and *Beilan* v. *Board of Public Education* (1958), 357 U. S. 399. Further, *Orloff* involved the granting of a commission in the armed forces, and *Lerner* and *Beilan* involved public employment; hence, all three cases involved a status far different from admission to the bar, where the public interest requires qualities of independence and intellectual integrity.

Garner v. *Board of Public Works of Los Angeles* (1951), 341 U. S. 716. Here requirement of both a non-communist oath and an affidavit as to whether affiant is or ever was a member of the Communist party were upheld as conditions for employment by the City of Los Angeles. Refusal to take the oath or to sign the affidavit were held valid grounds for discharge. It might be urged that it would have made no difference to the result in *Garner* had petitioners shown that their refusal was keyed to a good faith objection in principle to the oath and the affidavit. Several distinctions between *Garner* and the present case should be noted, however. First, *Garner* again involved public employment, not admission to the bar; second, the issue of good faith objection in principle was not presented to the Court and was not passed upon by it; and, finally, the requirements in *Garner* were announced publicly and applied with an even hand to all applicants for public employment. The asking of the Communist question by way of oath in the case of all applicants may present quite different issues of constitutionality than does the singling out of a particular applicant and asking the question of him, all without prior notice, without laying any proper foundation for the question and without adequate warning of the consequences of a refusal to answer, as in the present case.

CONCLUSION.

In *Konigsberg*, Mr. Justice Black suggested that there were two possible routes by which a State might have barred an applicant who refused to answer a relevant question; it might have weighed the evidence on the question of moral character; or, it might have been applying a rule that refusal *per se* bars. This distinction is useful because the constitutional issues raised by the two routes are somewhat different. In the first instance the action may be invalid because it is an irrational judgment on the evidence; in the second, because the rule employs an arbitrary criterion for selection to the bar.

In the instant case, Illinois may have taken either of these two routes. Insofar as it acted by way of a judgment of fact, we submit that there is no basis on this record for its conclusion that the Petitioner failed to meet his burden of producing evidence of "moral character and good citizenship." Insofar as it acted by way of an implicit rule that the refusal to answer is in and of itself enough, we submit it was employing an irrelevant and irrational criterion for admission to the bar that could arbitrarily serve only to give preference to the servile over the independent and candid.

We submit, therefore, that however Illinois' action in denying George Anastaplo admission to its bar is interpreted, it was unconstitutional action under the Fourteenth Amendment. And we respectfully ask the Court to reverse the judgment below. In so doing, the Court will not only do justice in this case, but it will be vividly reaffirming for generations of applicants to come, the high place that

candor, courage, and independence of mind have as attributes of that character and fitness which make the lawyer.

Respectfully submitted,

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